

House Bill 4064

Sponsored by Representative WHITSETT; Representatives CONGER, ESQUIVEL, HUFFMAN, JENSON, JOHNSON, KRIEGER, OLSON, SPRENGER, THOMPSON, WEIDNER, WHISNANT, Senators BAERTSCHIGER JR, BOQUIST, FERRIOLI, JOHNSON, OLSEN, WHITSETT (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Establishes standard for measuring distance between proposed or existing well and surface water source for purpose of determining probability or existence of impairment of, or substantial or undue interference with, existing rights of others to appropriate surface water.

Requires that Water Resources Department provide adversely affected or aggrieved water right holder with written notice of planned action before undertaking action to effectuate water rights established and determined in Water Resources Director's order of determination.

Requires that proposed final order or written notice of planned action adversely affecting or aggrieving water right applicant or water right holder state all facts, grounds or legal theories relied upon to support proposed final order or planned action. Requires that proposed final order or written notice of planned action include detailed findings and holdings based on clear and convincing evidence supporting proposed final order or planned action. Requires that evidence regarding proposed or existing well include report by qualified hydrologist containing certain information specific to well site.

Provides that proposed final order or written notice of planned action placing restriction or condition on exercise of proposed or existing water right for purpose of preventing impairment of, preventing interference with or otherwise benefiting superior water right must include evidence demonstrating that restriction or condition will accomplish purpose.

Prohibits department from amending proposed final order to allege additional facts, grounds, legal theories, findings or holdings supporting proposed final order if hearing on proposed final order has been requested. Prohibits department from alleging additional facts, grounds, legal theories, findings or holdings supporting planned action if water right holder has brought legal proceeding challenging planned action. Allows court to continue proceeding and issue judgment if department renders written notice of no practical effect without consent of plaintiff.

Makes water right applicant or holder prevailing party if department withdraws proposed final order or if applicant or holder obtains substantial modification of proposed final order. Provides that water right applicant or water right holder prevailing in contested case proceeding regarding proposed final order or on judicial review regarding final order is entitled to damages and reasonable attorney fees and costs.

Makes water right holder prevailing party in court action if department withdraws planned action during legal proceeding, if holder successfully defends action or if holder obtains stay, prevention or substantial modification of planned action in legal proceeding or on appeal. Provides that water right holder prevailing in legal proceeding or on appeal regarding planned action is entitled to damages and reasonable attorney fees and costs.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to procedures for regulating water rights; and declaring an emergency.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1. Sections 2 to 4 of this 2014 Act are added to and made a part of ORS 537.505**
5 **to 537.795.**

6 **SECTION 2. For purposes of determining the probability or existence of impairment of,**
7 **or substantial or undue interference with, existing rights of others to appropriate surface**
8 **water, any measurement of the distance between a surface water source and a proposed or**
9 **existing well location must be determined using the global positioning system coordinates of**
10 **the proposed or existing well and the ordinary high water mark, as defined in 33 C.F.R.**
11 **328.3(e), for a perennial stream, lake or spring.**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

SECTION 3. (1) As used in this section:

(a) “Adversely affecting or aggrieving” means that a Water Resources Department action or proposed final order:

(A) Rejects or terminates a water right;

(B) Imposes conditions, limitations or restrictions that would result in a materially lesser water right than the water right sought by a water right applicant; or

(C) Conditions, limits, restricts or otherwise impairs the value of a water right or use previously granted to a water right holder.

(b) “Determination order rights” means water rights established and determined by the Water Resources Director in an order of determination under ORS 539.130 that is pending adjudication by a circuit court.

(c) “Qualified hydrologist” means a person who has:

(A) A master’s or higher degree from an accredited educational institution in a hydrology-related field; and

(B) Five or more years of professional-level experience in a field related to hydrology.

(2) Before the Water Resources Department undertakes an action to effectuate determination order rights without issuing a proposed final order, the department shall provide written notice of the planned action to the water right holders that may be adversely affected or aggrieved by the action.

(3) If the department issues a proposed final order adversely affecting or aggrieving a water right applicant or water right holder, or issues written notice of a planned action as required under subsection (2) of this section, the proposed final order or written notice must:

(a) State all facts, grounds and legal theories relied upon by the department to support the proposed final order or the planned action; and

(b) Include detailed findings and holdings based on clear and convincing evidence that supports the proposed final order or the planned action.

(4) For purposes of findings and holdings under subsection (3)(b) of this section regarding a proposed or existing well, the clear and convincing evidence must include, but need not be limited to, a report by a qualified hydrologist regarding:

(a) The permeability, porosity and transmissivity of the water-bearing intervals at the specific well site; and

(b) The stratigraphy for the specific well site as determined by:

(A) Core samples from the well log; or

(B) If core samples are unavailable, a determination of the hydrologic characteristics of the water-bearing zones made by well logging equipment.

(5) In addition to any contents required under subsections (3) and (4) of this section, if the department issues a proposed final order or issues written notice of a planned action under subsection (2) of this section, and the proposed final order or planned action restricts or conditions the exercise of a proposed or existing water right for the purpose of preventing impairment of or interference with, or to otherwise benefit, a superior water right, the proposed final order or written notice must contain clear and convincing evidence that the restriction or condition will have a substantial and quantifiable effect on the superior water right. The evidence must demonstrate:

(a) A substantial and quantifiable hydrologic connectivity between the site of the proposed or existing well and the point of appropriation for the superior water right; or

1 (b) A rate of ground water flow between the site of the proposed or existing well and the
 2 point of appropriation for the superior water right that is likely to result in a substantial and
 3 quantifiable amount of additional water reaching the point of appropriation within 180 days
 4 after enforcement of the restriction or condition at the site of the proposed or existing well.

5 (6)(a) The department shall maintain a list of qualified hydrologists available to prepare
 6 reports under this section. Except as provided in paragraph (b) of this subsection, a qualified
 7 hydrologist chosen by the department and a qualified hydrologist chosen by the water right
 8 applicant or water right holder shall mutually select a qualified hydrologist to prepare a re-
 9 port.

10 (b) A water applicant or water right holder may waive the right to choose a qualified
 11 hydrologist under paragraph (a) of this subsection and allow the department to unilaterally
 12 select a qualified hydrologist to prepare a report for purposes of this section.

13 (7) The department shall pay all costs of choosing and selecting qualified hydrologists
 14 under subsection (6) of this section and of reports by selected qualified hydrologists prepared
 15 for possible use under this section. The department shall provide the water right applicant
 16 or water right holder with a copy of all reports prepared by a selected qualified hydrologist
 17 for possible use under this section without charge.

18 **SECTION 4.** (1) If the Water Resources Department receives a request for a hearing on
 19 a proposed final order that is subject to section 3 of this 2014 Act, the department may not
 20 amend the proposed final order by adding additional facts, grounds, legal theories, findings
 21 or holdings to support the proposed final order. The department may not withdraw a pro-
 22 posed final order after the hearing officer has issued a written notice of hearing under ORS
 23 183.413 (2), until the hearing officer has issued a proposed final order under ORS 183.464.

24 (2) If a water right holder commences a legal proceeding to stay, modify or prevent a
 25 planned action to effectuate determination order rights as described in a written notice is-
 26 sued under section 3 of this 2014 Act, the department may not allege in the legal proceeding
 27 additional facts, grounds, legal theories, findings or holdings to support the planned action
 28 that were not stated in the written notice. If the department withdraws a written notice or
 29 performs other activities after commencement of a legal proceeding that would render the
 30 written notice of no practical effect without the consent of the plaintiff, the court may con-
 31 tinue the proceeding and issue a judgment under ORS 14.175.

32 (3) If a water right applicant or water right holder is a prevailing party as described in
 33 subsection (4) of this section, the department shall pay the water right applicant or water
 34 right holder reasonable attorney fees and costs and the greater of:

35 (a) \$5,000 as liquidated damages; or

36 (b) Double the actual damages proven by the prevailing water right applicant or water
 37 right holder.

38 (4)(a) If the department issues a proposed final order that is subject to section 3 of this
 39 2014 Act, a water right applicant or water right holder is a prevailing party for purposes of
 40 subsection (3) of this section if:

41 (A) The water right applicant or water right holder requests a contested case hearing
 42 regarding the proposed final order and, at any point in a contested case proceeding subse-
 43 quent to the hearing request or on judicial review, the department withdraws the proposed
 44 final order; or

45 (B) The water right applicant or water right holder obtains substantial modification of

1 the proposed final order in a contested case proceeding or on judicial review.

2 (b) If the department issues a written notice of planned action that is subject to section
3 3 of this 2014 Act, a water right holder is a prevailing party for purposes of subsection (3)
4 of this section if:

5 (A) The water right holder brings a legal proceeding to stay, modify or prevent the
6 planned action and, at any point in the proceeding, the department withdraws the written
7 notice or performs other activities that would render the written notice of no practical effect
8 on the plaintiff;

9 (B) The water right holder is a defendant in a legal proceeding brought by the department
10 regarding a planned action and, at any point in the proceeding, the department withdraws
11 the written notice or performs other activities that would render the written notice of no
12 practical effect on the plaintiff; or

13 (C) The water right holder obtains a stay, prevention or a substantial modification of the
14 planned action in the legal proceeding or on appeal.

15 **SECTION 5.** (1) Section 2 of this 2014 Act applies to determinations that the Water Re-
16 sources Department makes on or after the effective date of this 2014 Act finding the proba-
17 bility or existence of an impairment of, or substantial or undue interference with, existing
18 rights to appropriate surface water.

19 (2) Section 3 of this 2014 Act applies to:

20 (a) Actions by the department undertaken on or after the effective date of this 2014 Act
21 to effectuate determination order rights established and determined in an order of determi-
22 nation before, on or after the effective date of this 2014 Act; and

23 (b) Proposed final orders that become final by operation of law or on appeal on or after
24 the effective date of this 2014 Act.

25 (3) The department may take actions that the department considers appropriate to ex-
26 pediently develop and issue an initial list of qualified hydrologists available to be chosen or
27 selected under section 3 of this 2014 Act. The department shall issue the initial list of quali-
28 fied hydrologists available to be chosen or selected under section 3 of this 2014 Act no later
29 than 180 days after the effective date of this 2014 Act.

30 (4) Notwithstanding section 3 of this 2014 Act, if a water right applicant or water right
31 holder has an application pending with the department on the effective date of this 2014 Act,
32 the applicant or holder may execute a written waiver no later than 180 days after the effec-
33 tive date of this 2014 Act that allows the department to issue a proposed final order based
34 on a hydrology report prepared by a person who:

35 (a) Is selected by the department; and

36 (b) Need not be a qualified hydrologist as defined in section 3 of this 2014 Act.

37 **SECTION 6.** This 2014 Act being necessary for the immediate preservation of the public
38 peace, health and safety, an emergency is declared to exist, and this 2014 Act takes effect
39 on its passage.

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